IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-625

DENNIS JOHN LEWIS
a/k/a Richard Kennedy,

Petitioner,

v.

GREYHOUND LINES-EAST, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN DANIEL KEEFFE

Suite 1040
733 15th Street, N.W.
Washington, D.C. 20005
Attorney for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

DENNIS JOHN LEWIS
a/k/a Richard Kennedy,

Petitioner,

v.

GREYHOUND LINES-EAST, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Dennis John Lewis respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth in Appendix A, *infra*. The order of the United States

Court of Appeals for the District of Columbia Circuit denying the petition for rehearing and suggestion for rehearing *en banc* is set forth in Appendix B, *infra*. The opinion of the Court of Appeals is reported at 555 F.2d 1053 (D.C. Cir. 1977). The opinion and order of the United States District Court for the District of Columbia dismissing the Complaint is set forth in Appendix C, *infra*. The opinion of the United States District Court for the District of Columbia is reported at 411 F. Supp. 368 (D.D.C. 1976).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, dated May 12, 1977, was entered on May 12, 1977 (App. A, *infra*). A timely petition for rehearing and suggestion for rehearing *en banc* were denied on July 22, 1977. (App. B *infra*.) By order dated October 26, 1977, the Chief Justice scheduled the time for filing a petition for writ of certiorari to and including October 28, 1977. The jurisdiction of this Court is invoked and under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

(1) Whether the District of Columbia Circuit's ruling subverts the precedent of *Hines v. Anchor Motor-Freight, Inc.*, 424 U.S. 554 (1976), by freeing labor unions to substantially modify collective bargaining provisions dealing with members' disciplinary hearing rights without notifying the membership of such changes.

(2) Whether the arbitrator's award should be set aside under the teaching of *United Steelworkers of*

America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), that the arbitrator's award must both procedurally and substantively conform to the provisions of the collective bargaining agreement.

(3) Whether the arbitration award should be set aside, where the collective bargaining agreement called for a written decision of a majority of the three member arbitration board, but the award itself was signed by only one arbitrator who stated that the opinion was his sole responsibility.

STATUTE INVOLVED

The applicable statute is Section 301 of the Labor Management Relations Act, *as amended*, 29 U.S.C. § 185. (App. D, *infra*).

STATEMENT OF THE CASE

Dennis John Lewis brought this action in the United States District Court for the District of Columbia. He based jurisdiction upon section 301(a) of the Labor Management Relations Act, as amended, and alleged that Greyhound had denied him his right to a union representative at a meeting with the employer for disciplinary reasons. He alleged that Greyhound arbitrarily discharged him. Petitioner further alleged that the union breached its duty of fair representation towards him in its handling of the grievance he filed against the Company. Petitioner also alleged that the arbitrator's decision of April 28, 1975 was arbitrary and partial against the petitioner as well as being clearly outside the scope of the collective bargaining agreement.

On August 3, 1977, at approximately 7:55 A.M., five minutes before quitting time, Lewis was summoned by Greyhound City Sales Supervisor, Marion McGuffey to a disciplinary hearing at Mr. McGuffey's office. Mr. McGuffey told petitioner, who was then a night telephone information clerk, that he wanted to discuss petitioner's work performance. Petitioner, with reason to expect disciplinary action as a result of this meeting, requested the presence of his union representative. Prior to this time petitioner had been told that he was entitled to be represented by union representatives at such hearings. The supervisor, however, insisted on his immediate attendance even without a union representative. The supervisor did not inform petitioner that he was not entitled to the presence of a union representative.

Petitioner punched out at 8:01 a.m. and departed for his other job which began at 9:00 a.m. with another company. While petitioner was at the other job he received a call from Mr. Brown, the Regional Manager for Greyhound, who informed petitioner that he was not to report for work in the future until he met with Brown and McGuffey about the work related charges made by Mr. McGuffey.

From August 3, 1973 to August 6, 1973, petitioner attempted to contact his union president, David Butler, without success. On August 7, 1973, petitioner met with Mr. Butler who informed him, without having the particulars of petitioner's case, that he had no right to a union representative at the meeting demanded by Brown and McGuffey. Mr. Butler presented petitioner with a copy of a page of a document known as "The Interpretations Manual."

Petitioner was at this time informed that this was an agreement entered into by the union and Greyhound

management representatives. The page that was shown him contained a rule which stated that an employee may not have union representation in any meeting requested by management until discipline had been administered. Petitioner and other employees at Greyhound, however, were never informed of the existence of such a rule, nor even the existence of the interpretations manual by either the company or the union. Furthermore, the union and company had previously led Plaintiffs and others to believe that they had the right to union representation at the very type of meeting Brown and McGuffey had demanded.

Petitioner and Mr. Butler attempted to meet with Terminal Manager Brown on August 7, 1973, but were told that Mr. Brown was busy and would be unavailable to see them at any time that day. On August 8, 1973, the meeting with Brown and McGuffey was finally held. Although Mr. Butler was present, Brown and McGuffey would let him sit in and represent Petitioner for only part of the meeting. Mr. Butler, however, continued to adhere to his position that petitioner was not entitled to a union representative at the meeting with his employer, citing the Interpretations Manual as his authority. At the conclusion of the meeting the company's customary discharge form was delivered by Mr. Brown to petitioner. It was dated August 7, 1973, the day before the meeting.

On August 8, 1973, petitioner filed a grievance against Greyhound.[1] The grievance was heard by three

---

[1] On or about October 18, 1973, petitioner spoke with Mr. Butler concerning his grievance. Mr. Butler informed petitioner that if he was unsuccessful before company representatives, petitioner could present his case before a three man arbitration board. He further advised petitioner that if this effort was unsuccessful, his

[footnote continued]

arbitrators. On April 28, 1975, arbitrator Knowlton, in an opinion signed only by him and stating that the opinion was his "sole responsibility, found that petitioner had abandoned his job because of his failure to communicate with Mr. Brown between August 3 and August 7, 1973.[2]

On December 4, 1975, petitioner filed suit in the United States District Court for the District of Columbia. On April 23, 1976, the District Court granted defendants' Motion to Dismiss, finding that petitioner had failed to state a claim for relief on the theory that there had been ill will or bad faith on the part of the union in presenting the grievance, or that the union had led petitioner to believe that National Labor Relations Board action could be filed after arbitration, causing petitioner to delay private action beyond the six month statute of limitations and that the arbitrator had correctly decided that petitioner had abandoned his job. (App. C, *infra* p.)

On May 12, 1977, the United States Court of Appeals for the District of Columbia Circuit, Judge

---

case could be appealed to a two man arbitration board. He then advised petitioner that if petitioner was unsuccessful after that disposition, he could present the matter before the National Labor Relations Board.

[2]By letter to the Clerk of the United States Court of Appeals for the District of Columbia Circuit, dated July 2, 1977, counsel for Greyhound Lines-East, represented to the Court of Appeals that at some time between the arbitrator's award of April 28, 1975, and June 25, 1975, the other arbitrators signed copies of the award. Counsel did not indicate, however, whether the other members of the arbitration board concurred or dissented in arbitrator Knowlton's opinion and did not affix a signed copy of the award to the July 2, 1977, letter. Thus, there is no record of the extent to which either of the two other members of the arbitration board considered, reviewed, and adjudicated petitioner's claim.

MacKinnon dissenting, affirmed the District Court's ruling. The Court of Appeals based its affirmance of the arbitral award on its conclusion that the union had not undermined the integrity of the arbitration proceedings. (App. A, p. 1a, *infra.*)

REASONS FOR GRANTING REVIEW

A.

THE DISTRICT OF COLUMBIA CIRCUIT HAS CREATED A RULE WHICH CONFLICTS WITH DECISIONS OF THIS COURT.

The District of Columbia Circuit's ruling conflicts squarely with the precedent of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The District of Columbia Circuit's decision not only leaves standing an award tainted with procedural flaws indicating a miscarriage of justice, but also frees labor unions to substantially modify their collective bargaining agreements, while imposing no corresponding duty upon the union to inform its membership of such far-sweeping changes as modification of the members' previously existing rights in disciplinary and grievance proceedings. The panel also ignored this Court's ruling in *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. As indicated below, under *Vaca v. Sipes*, 386 U.S. 171 (1967), petitioner alleged conduct on the part of the union which was arbitrary, discriminatory, and in bad faith.

The District of Columbia Circuit's opinion, by failing to recognize that the union breached its duty of fair representation to petitioner, failed to follow this Court's ruling in *Hines, supra*. By failing to inform petitioner prior to the dispute that he was not entitled to union representation because of the alleged modification of the agreement between the union and company, the union breached its duty of fair representation to petitioner. As Judge MacKinnon correctly noted in his dissent:

> A union owes an obligation to its members, if it is to fairly represent them, to inform them of material changes in the collective bargaining agreement with employers and particularly of those changes which directly affect the rights of employees in disciplinary and grievance proceedings.

It is clear from the arbitrator's decision that the union's breach of the duty of fair representation seriously undermined and tainted the arbitration proceeding. Throughout the arbitration proceeding, the union held to its position that it had agreed with the company that a union member was not entitled to a union representative at the type of meeting demanded by appellant's supervisors where the union member had reason to believe that discipline might take place. As noted by Judge MacKinnon, the union's statement to appellant that it would not raise the fair representation issue in any proceedings before the Labor Board further evidences the Union's breach of its duty of fair representation, as well as indicating the union's "obvious conflict of interest in not stressing its *own delinquency* as the major cause of Lewis not attending the hearing." (emphasis in original), App. A, *infra* at p. 5a, *citing, Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976).

The District of Columbia Circuit's decision also fails to follow the teaching of *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). As the majority itself acknowledged, an arbitrator's award must be set aside if there are serious "procedural flaws indicating the possibility of a miscarriage of justice." (Appendix A, *infra* at p. 2a). In this case a serious procedural flaw is present since the collective bargaining agreement called for three arbitrators, but the arbitration award was signed only by arbitrator Knowlton, who stated that the opinion was his "sole responsibility".[3] In fact the collective bargaining agreement *specifically required* a written decision of a majority of the members of the Board of Arbitration. The contract specifically provides that:

> The Board so constituted will convene immediately and weigh all evidence and agreements on the point in dispute and the *written decision of a majority of the members of the Board of Arbitration shall be final and binding upon the parties.* (Emphasis supplied)

As Judge MacKinnon's dissenting opinion correctly notes (Appendix A, *infra* at p. 6a), this error constitutes not only a serious procedural irregularity

---

[3] As indicated in footnote 2 *supra*, counsel for Greyhound Lines-East indicated to the Court of Appeals that at some time between the arbitrator's award of April 28, 1975, and June 25, 1975, the other arbitrators affixed their signature to the award. Since the fully signed copy of the award was not produced by counsel, there is no indication of whether, and the extent to which, the other arbitrators concurred in arbitrator Knowlton's findings. Even assuming that the other arbitrators signed the award, the award states that the opinion is the "sole responsibility" of arbitrator Knowlton. Thus, on its face, the award contravenes the collective bargaining agreement's requirement that the board issue a "written decision of a majority of the members of the board of arbitration."

under decisions of both the National Labor Relations Board and the Circuit Courts, (*International Harvester Co.*, 138 NLRB 923, 927 (1962), *enforced sub nom, Ramsey* v. *NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964); *see also Food Handler's Local 425, Amalgamated Meat Cutters and Butchers Workers of North America, Inc.* v. *Plass Poultry, Inc.* 260 F.2d 835, 836-837 (8th Cir. 1958), but also contravenes the *United Steelworker* Court's teaching that an arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement. Under *United Steelworkers*, courts must refuse enforcement of the arbitral awards "where the arbitrator's words manifest an infidelity to this obligation." *Lewis* v. *Greyhound Lines-East, et al.*, 555 F.2d 1053, 1058 (D.C. Cir. 1977) (MacKinnon, J., dissenting), *citing United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

The panel's decision further breached the teaching of *United Steelworkers, supra*, in failing to recognize that the arbitrator's award additionally went outside the scope of the collective bargaining agreement in making the alleged agreed upon understanding between the union and the employer the basis of the agreement. In his opinion, the arbitrator makes mention of an agreed upon understanding between the union and the employer that employees were not entitled to have union representatives present at disciplinary hearings. At page 3 of his opinion, the arbitrator drew the following conclusion:

> "From that point on, certainly Mr. Kennedy's difficulties were completely the result of his own failure to accept these agreed upon practices and procedures."

The arbitrator's decision clearly exceeded the scope of his authority, which under the collective bargaining agreement in this case gave him no authority to "add to, nor modify the terms of the collective bargaining agreement." In relying on this "agreed upon understanding of the employer and union," the arbitrator based the essence of his decision on something clearly outside the scope of the collective bargaining agreement. The arbitrator was therefore in violation both of the standard set in the *United Steelworkers* opinion, *supra*, and in excess of his authority under the collective bargaining agreement.

Additionally, the arbitrator's award was in manifest disregard of this Court's decision in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), and therefore should be vacated. *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123 (2nd Cir. 1969). As the arbitrator recognized, *Weingarten* provides the employee with the right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres. While the arbitrator found that some disciplinary action would possibly have occurred at the initial meeting between petitioner and his employer, he ignored the applicable law and found that petitioner refused "to recognize and accept his obligation as an employee. . . ."

Accordingly, the Circuit Court erred in affirming the District Court's dismissal of the complaint.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN DANIEL KEEFFE
Suite 1040
733 - 15th Street, N.W.
Washington, D.C. 20005
Attorney for Petitioner.

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1583

DENNIS JOHN LEWIS
a/k/a RICHARD KENNEDY, APPELLANT

v.

GREYHOUND LINES-EAST, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 75-2039)

Submitted without argument 22 April 1977

Decided 12 May 1977

Stephen Daniel Keeffe and *Gregory M. Murad*, were on the brief for appellant.

Bernard N. Katz, was on the brief for appellee Amalgamated Transit Union. *David Bare* also entered an appearance for appellee, Amalgamated Transit Union.

Edward R. Levin and *David W. Rutstein*, were on the brief for appellee, Greyhound Lines-East.

Before: MACKINNON, ROBB and WILKEY, *Circuit Judges*

Opinion Per Curiam

Dissenting Opinion filed by *Circuit Judge* MACKINNON.

PER CURIAM: In this suit under Section 301 of the Labor Management Relations Act,[1] appellant contended that he was wrongfully discharged by Greyhound Lines-East (Employer) and that the Amalgamated Transit Union (Union) breached its duty of fair representation in the processing of his grievance. Appellant sought, among other things, to overturn the award in arbitration sustaining his discharge. This appeal is taken from the order of the District Court, granting motions to dismiss by the Employer and the Union. We affirm, largely on the basis of the opinion of the District Court (Pratt, J.).[2] Through a brief highlight of the basic issues, we would like to exemplify various points of agreement with the District Court.

The basic reason for appellant's discharge is that he abandoned his job. In brief, he refused to return to his job after being told that he must attend a disciplinary meeting with the Employer without a Union representative. After a time he located the Union President, who also told him he was not entitled to a Union representative at all possible disciplinary meetings (although the Union President did accompany appellant to all such meetings). After a discharge ensued, appellant and the Union instituted a grievance and prosecuted it through arbitration. As noted, the arbiter sustained the discharge.

We emphasize at the outset that this appeal does not call upon us to review the merits of the discharge. The collective bargaining agreement provided for arbitration

[1] 29 U.S.C. § 185.

[2] *Lewis* v. *#1 Greyhound Lines—East*, 411 F.Supp. 368 (D.C.D.C. 1976).

as the exclusive grievance mechanism; where arbitration is so specified in the collective bargaining agreement, courts must respect this and accept the award as final and binding in the absence of procedural flaws indicating the possibility of a miscarriage of justice. An award can be set aside if the union breaches its duty of fair representation in connection with the arbitration proceedings, *Hines* v. *Anchor Motor Freight*,[3] but, as the District Court properly found here, *see infra*, no breach of duty occurred. Given the absence of any procedural flaws in an arbitral award agreed by Union and Employer to be exclusive and final, it is hardly the role of an appellate court to go behind the arbiter's findings and retry this discharge complaint on the facts at this level. We thus affirm the enforcement of the finality provision as respects the arbitration here.[4]

[3] 424 U.S. 554 (1976).

[4] Even were we to reach the merits for any reason, it does not appear to us that the arbiter was arbitrary in sustaining the discharge. The arbiter essentially found that in his failure to report to work after being asked to attend a disciplinary meeting the appellant failed "to recognize the right of the Employer to reasonably control the activities of its employees. . . ." *Opinion and Award*; Appendix at 31. In other words, it is not the legitimate prerogative of the employee to disobey a supervisory order, even if he believes that his contractual rights are violated. Lewis should have gone to the supervisor's office immediately. If he deemed that action improper, he should have pursued his remedy through the established grievance procedure. Since he refused to report to work or to the meeting for a four-day period, during only one of which days, 7 August 1973, does it appear that he could not do so because a meeting with the Employer could not be arranged, Lewis' absence from work was indeed a voluntary absence and could provide basis for a lawful discharge. In addition, the arbiter found that the disciplinary meeting, which the Union President attended, turned out to be "incomplete and ineffective" due to the appellant's "atti-

As evidence that the Union breached its duty of fair representation, the appellant relied heavily upon the fact that the President of the Union told him that he was not entitled to a Union representative at the first possible disciplinary meeting. However, the statement of the Union President was based upon "an interpretations manual of the collective bargaining agreement," thus detracting, in the judgment of the District Court, from the allegations of bad faith that appellant must set out to show the breach of the Union's duty. The District Court also noted that the events in the case occurred in 1973, prior to the decision in 1975, *NLRB* v. *Weingarten, Inc.*,[5] holding lack of union representation at disciplinary meetings to be an unfair labor practice.

Appellant also denominated, as further evidence of bad faith, the Union's failure to file an action with the NLRB *after* the arbitration. (The Union pressed appellant's discharge to arbitration, where it provided counsel through two days of proceedings). The District Court very properly responded that a union does not have to advance to the NLRB every grievance of its members. It possesses discretion to pursue only those grievances it fairly considers to be meritorious. In addition, the District Court noted, appellant cannot complain of the running of the statute of limitations on the NLRB appeal since the Union disclosed its intention to challenge only the wrongful discharge, and not the representation issue.

---

tude," *e.g.*, his unfounded charges of lying. According to the arbiter, appellant failed "to heed the advice of his Union representative whose intercession he had requested, when the latter attempted to handle the dispute intelligently and correctly." *Ibid.*

[5] 420 U.S. 251. Moreover, we might point out, the Board of Arbitration considered *Weingarten* and found it inapplicable, *i.e.*, appellant was provided union representation. *Opinion and Award*; App. at 31.

In sum, the District Court correctly decided not to set aside the arbitration award. Since the representation of the Union did not undermine the integrity of the arbitration proceedings, the arbitration award should be enforced as final and binding.

The order of the District Court, granting the motions to dismiss, is hereby

Affirmed.

MACKINNON, *Circuit Judge*, dissenting: Lewis complains that he was unlawfully discharged in violation of the union-company contract, a claim cognizable under section 301 of the Taft-Hartley Act.

On August 3, 1973 (a Friday), at about 7:50 A.M., ten minutes before quitting time, Lewis was summoned to his supervisor's office at the Greyhound Bus Company for a disciplinary hearing. He was told that the supervisor wanted to "discuss the quality of his work." He replied that he would not attend such meeting without the presence of a union representative. Prior to this time Lewis had been told that he was entitled to be represented by union representatives at such hearings. The supervisor, however, insisted on his immediate attendance even without a union representative. The supervisor did not inform Lewis that he was *not* entitled to the presence of a union representative.

Lewis punched out at 8:01 A.M. and departed for his other job which began at 9 A.M. with another company. Later that morning while Lewis was at his other work he received a phone call from Mr. Brown, the Regional Manager for Greyhound, who told Lewis "unless . . . he [reported] to my office at once without a union representative . . . [he] would not be allowed to return to work." *See* finding of arbitrator, App. 28. The arbitrator finds that these words, "at once" or "immediately" as used by Brown in his phone call were not necessarily intended to mean that Lewis had to leave his daytime employment and return to the terminal because it was apparently coupled with a statement that *Lewis would not be permitted to work until he had first met with Brown and that it would be necessary to make an appointment ahead of time to do so.* The arbitrator found that it could not be concluded that "it was then the intention of the Employer to do more than reassert its position that a meeting must take place at a mutually

convenient time in accordance with accepted practice." App. 29.

Over the weekend of August 4th (a Saturday) and 5th and also on August 6th, Lewis attempted to communicate with Mr. Butler, his union president, but was unable to find him at his office. On August 6th (Monday) he finally reached Mr. Butler on the telephone and on Tuesday, the 7th, he met with Mr. Butler in the morning at the Greyhound terminal and at that time an attempt was made to meet with Mr. Brown, the Greyhound representative. Mr. Brown, however, was "busy and was unable to see Mr. [Lewis] . . . at that time, but an arrangement was made for a meeting to take place on the following day, August 8th." App. 29.

The meeting finally took place on August 8th. Lewis denied the charges in strong language and *at the conclusion of the meeting* the company's customary discharge form (Form 6) was delivered by Mr. Brown to Mr. Lewis. The document was signed by Mr. Brown. *It was dated August 7th, the day before the meeting.* App. 30. Thereafter Lewis contested his discharge by filing a grievance.

This grievance was heard by three arbitrators. The arbitration award states that Lewis "abandoned his job because of his failure to communicate with Mr. Brown from August 3 through August 7" and *apparently* upheld the discharge. App. 31. The opinion admitted, however, that the basis for the action was *incomplete* because Lewis did make efforts to support his position to the extent that he had attempted to communicate with Mr. Butler.

The arbitration opinion and award recites that the arbitrators met on June 12, 1974 and February 11, 1975 but the copy thereof, that is contained in the appendix (App. 27-32), is signed *only by one arbitrator*, "Knowl-

ton" (App. 32). The lines for the signatures of the other two arbitrators state "Concurring/Dissenting" (App. 32). To what extent the other arbitrators concurred or dissented is nowhere indicated. The arbitrator's opinion and award also contains the following disclaimer:

> The following opinion is the sole responsibility of the undersigned, Knowlton. (App. 27)

The upshot was that Lewis was fired allegedly for *abandoning* his job after he had been ordered by his supervisor not to return to work until he had first met with Mr. Brown. App. 29. Following such orders from Brown he did not report for work because he was attempting to find the union officer to represent him in his hearing before Brown and some of the delay was caused by Brown's unavailability. The intervention of the weekend in August (the 4th and 5th) also made it difficult to reach his union representative. Lewis was eventually advised that under some *recent modification* of the union's agreement with Greyhound, he was not entitled to a union representative at the first such meeting. When he learned this, Lewis immediately appeared before Brown. He did, however, have a union representative.

At the hearing he was discharged *nunc pro tunc* for *abandoning his job* during the 4-day period, August 3 to August 7; that the company had told him *not* to report for work unless he had reported for the disciplinary hearing. In view of the fact that the employee had followed his superior's orders in not reporting for work, I find it impossible to support a finding that he "abandoned" his job while he was seeking his union representative to help him preserve his job. Abandonment involves an intentional act and his compliance with Brown's order is completely inconsistent with any claim that he acted

intentionally in absenting himself from work. He was industriously working at *two* jobs—hardly the sort of person that would wilfully refuse to work or intentionally "abandon" one job. Abandonment always involves a question of intention, *Columbian Insurance Company v. Ashby*, 29 U.S. (4 Pet.) 139, 143 (1830) and as Judge Johnsen stated in *Equitable Life Assurance Society v. Mercantile-Commerce Bank & Trust Co.*, 155 F.2d 776, 779-780 (8th Cir. 1946), "abandonment 'is a fact made up of an intention to abandon, and the external act by which the intention is carried into effect,'" (Citing cases.) These two elements must conjoin and operate together or there is no abandonment. *Helvering v. Jones*, 120 F.2d 828, 830 (8th Cir. 1941): "Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed." *Saxlehner v. Eisner & Mendelsom Co.*, 179 U.S. 19, 31 (1900). The cases are myriad that hold both elements must coalesce before abandonment will be found to exist. 1 *Words and Phrases* 101-106 (1964). All the evidence in this record belies that Lewis had the requisite intention to abandon his job. I would thus find on the admitted facts of this record that Lewis did not "abandon" his job during the four days he was attempting to find a representative of the union to appear with him at the company-requested disciplinary hearing in his effort to help him hold his job—at the same time complying with the supervisor's order to not report for work until the disciplinary hearing had been held.

Also, it does not appear from the document in the appendix (App. 27-32) that the arbitration award had been sufficiently proved. The collective bargaining agreement provides "in discharge cases, the third arbitrator shall be instructed to issue his decision as promptly as possible . . ." App. 25. If the arbitration award filed by "Knowlton" was signed by him as the third arbitrator,

that still does not explain the absence of the signature of the other two arbitrators nor the extent to which they "concurred" or "dissented" in the opinion and award.

To summarize, it appears that Lewis was fired for "abandoning" his job when he was in reality complying with his supervisor's order not to return to work until he had reported for his disciplinary hearing. This hearing was delayed while Lewis was seeking his union representative to appear with him, only to learn when he found him that he was not "entitled" to such representation because of some modification of the agreement between the union and the company which had not been communicated to Lewis either before the dispute arose or at any time before August 8th when he did appear. The company through Butler was at fault in not informing Lewis that he was not entitled to union representation when he first stated he insisted thereon. And more so, the union was also substantially at fault for the delay in Lewis appearing for the hearing. It breached its duty of fair representation to Lewis by not informing Lewis and its other Greyhound members of the substantive change which denied them union representation at initial company disciplinary conferences. A union owes an obligation to its members, if it is to fairly represent them, to inform them of material changes in the collective bargaining agreements with employers and particularly of those changes that directly affect the rights of employees in disciplinary and grievance proceedings. This delinquency on the part of the union tainted the arbitration proceeding because the union had an obvious conflict of interest in not stressing its *own delinquency* as the major cause of Lewis not immediately attending the hearing. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976). A more vigorous advocate, untainted with being the principal cause of the reason for the employee's discharge, might have prevailed before the arbitrators.

The fact that the union told Lewis it did not plan to raise the fair representation issue in any proceedings before the Labor Board (Maj. op. p. 3), is further indication of its breach of its duty of fair representation—it could hardly be expected to raise its own failure to fairly represent Lewis as a reason for setting aside the arbitrators' award and upsetting the validity of the discharge—caused as it was largely by its own neglect.

It is true that a union possesses wide discretion to bring a member's complaint before the Board, but the exercise of that discretion is not beyond review where the interests of a union and its member are in conflict. The union was content to rest with an arbitrator's award that appears may be facially invalid. It was signed by only one arbitrator, and clearly stated that it was "the sole responsibility" of that one arbitrator (J.A. 27). This court can only rule on the record before it, and on that record, there is no explanation for the facial flaw in the arbitration opinion.

An error of this type would, at the least, constitute a "serious procedural irregularity," *International Harvester Co.*, 138 NLRB 923, 927 (1962), *enforced sub nom., Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964), which, under NLRB practice, would suffice to oust any deference to the arbitration award. *See also Spielburg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955). Hence, the union could have been fairly sure of a *de novo* hearing had it taken Lewis' complaint to the Board.

Failure to object to so obvious a shortcoming could raise an inference of a breach of the union's duty of fair representation. The inducement for the union in this case not to object to the arbitration opinion might well have been that (going beyond the issue before him) the arbitrator gratuitously pointed out that "[t]he failure of [the grievance] procedure to operate effectively was

in no way due to any lack of representation by the Union . . . ." (J.A. 31). But, obviously, it was.

In my view we should reverse the District Court's decision and remand the case to determine the validity of the arbitration opinion and award and to determine the views of the other two arbitrators. This court cannot decide (at least should not decide) cases on such a sketchy record. If the arbitration award was, as is presently indicated on this record, the opinion of only one arbitrator when the contract called for three, no deference should have been accorded it by the District Court. An arbitrator's "award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

I would also order that a hearing be held to determine the extent to which the union breached its duty of fair representation by failing to inform Lewis in advance of his disciplinary problem that he was not entitled to union representation at a first meeting with the company, and also into the responsibility of the company for Lewis' ensuing absence from work which resulted from its supervisor not informing Lewis, when he stated he desired union representation, that he was not entitled to such representation at that stage of the matter.

For the above reasons I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976
Civil Action No. 75-2039

No. 76-1583

Dennis John Lewis
a/k/a Richard Kennedy,

Appellant

v.

Greyhound Lines-East, et al.

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

Upon consideration of the suggestion for rehearing *en banc* filed by appellant Dennis John Lewis, and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

/s/ Robert A. Bonner
By: Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-2039

DENNIS JOHN LEWIS,
Plaintiff,
v.
GREYHOUND LINES-EAST *et al.*
Defendants.

MEMORANDUM OPINION AND ORDER

This is a suit under the Labor Management Relations Act, 29 U.S.C. §151 *et seq.* Plaintiff, a former employee of defendant Greyhound Lines-East, is suing his employer for reinstatement and money damages for an allegedly wrongful discharge. Additionally, he sues his union, the Amalgamated Transit Union, AFL-CIO, for allegedly having breached its duty of fair representation during the formalized protest of plaintiff's wrongful discharge. Both defendants have filed motions to dismiss, which bring the matter before the Court.

The facts may be briefly stated. On August 3, 1973, plaintiff was summoned to a supervisor's office. Since he feared that the call was for disciplinary purposes, plaintiff demanded that he be permitted union representation. The request was denied, and later that day plaintiff was told not to return to work until he would agree to meet with his supervisor. For the next

three days, plaintiff attempted to contact the union president for guidance, but did not communicate with Greyhound. On August 8, 1973, plaintiff finally met with his supervisor, and was represented by union president Butler during part of the meeting. At that meeting, plaintiff's employment was terminated on the ground that he had abandoned his job.

Thereafter, plaintiff and his union instituted a grievance on the dismissal issue, which was prosecuted through aribtration. At all times plaintiff was represented either by union president Butler or by counsel. Plaintiff claims that even in the face of this representation, the union breached its duty of fair representation in two respects, hereinafter discussed.

It is appropriate at the outset to set forth the general outlines of a union's admitted duty of representation of its members. The union breaches its duty when its conduct toward any member is arbitrary, discriminatory, or in bad faith. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). At this preliminary stage of litigation, it is plaintiff's burden to show a threshold level of such ill-motive or arbitrary action to support his claim. *Balaowski* v. *International U., United A., A. & A. Imp. Wkrs.*, 372 F.2d 829 (6th Cir. 1967). Mere conclusory allegations, requiring the Court to infer bad faith from seemingly innocuous facts, are insufficient to meet this standard. *Lusk* v. *Eastern Products Corp.*, 427 F.2d 705 (4th Cir. 1970).

Plaintiff's first claim of breach is based on union president Butler's assertion that plaintiff was not entitled to representation at the original meeting which the supervisor sought on August 3, 1973, and which took place on August 8, 1973. Butler communicated this position to plaintiff during their first conversation,

August 7, 1973, and, as authority, cited an interpretations manual of the collective bargaining agreement. Nevertheless, Butler did participate in the August 8, 1973 meeting with Greyhound, during which plaintiff was discharged.

From these actions plaintiff would have us infer that the union did not show good faith in prosecuting the basic grievance of wrongful discharge against Greyhound.[1] To the contrary, the union relied on a formalized set of contract interpretations to determine whether plaintiff had a right to be represented at the disciplinary meeting in early August. Viewing all inferences in a light most favorable to plaintiff, it appears that he has not alleged facts sufficient to support an inference of ill-will or bad faith to state a claim upon which relief can be granted.

Plaintiff's second claim of breach is equally unavailing. He asserts that the union led him to believe that an N.L.R.B. action could be filed after arbitration, which induced him to delay a private action beyond the six-month statute of limitations. 29 U.S.C. §160(b). Both this and the refusal of the union to file an N.L.R.B. action on his behalf, plaintiff argues, is suggestive of bad faith on the union's part.

The union is not required to advance every grievance of its members. It is accorded wide latitude in determining which disputes have merit and are deserving

---

[1] Plaintiff argues that union president Butler acted in complete disregard of the applicable law of unfair labor practices. In support of that claim he cites two 1975 decisions of the United States Supreme Court, *N.L.R.B.* v. *Weingarten*, ____ U.S. ____, and *International Ladies Garment Workers' Union* v. *Quality Manufacturing Company*, ____ U.S. ____. The acts now at issue, however, occurred in 1973.

of union sponsorship. *Vaca* v. *Sipes, supra.* Thus, the mere recital that the union exercised its discretion does not, of itself, suggest hostile motive.

Moreover, undisputed facts in plaintiff's affidavit support an inference that the union had no desire to prejudice plaintiff's rights. The union made full disclosure of their intention to challenge only the wrongful discharge, and not the representation issue. Rather than attempting to lull plaintiff into a false sense of security, this notice ensured that plaintiff would take steps on his own to remedy the representation issue. That plaintiff failed to initiate such action should not now support a claim against the union. Plaintiff's claim against the union is without merit.

With respect to the claim against his employer, plaintiff's action against Greyhound for wrongful discharge has already been arbitrated, pursuant to the collective bargaining contract. The arbitor, in a proceeding at which plaintiff was fully represented by the defendant union, decided that plaintiff's claim of wrongful discharge was groundless. It is well settled that when arbitration is the exclusive grievance mechanism provided by the collective bargaining contract, as was the case here, unless plaintiff can show that union activity undermined the integrity of the arbitration proceeding, or that the arbitor acted outside the scope of the contract, the courts should not review the merits of that decision. *Hines* v. *Anchor Motor Freight, Inc.*, ____ U.S. ____ (1976); *United Steelworkers of Am.* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Here, the union at all times met its obligation of representation, and the arbitor, having jurisdiction, correctly decided adversely to the plaintiff the question of whether plaintiff had abandoned his job.

Accordingly, it is this 23rd day of April, 1976,

ORDERED, that the motions to dismiss of defendants Greyhound Lines-East and Amalgamated Transit Union, be and the same hereby are granted, and the complaint is dismissed.

/s/ J. H. Pratt
John H. Pratt
United States District Judge

APPENDIX D

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains

its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)
